# DISSENT OF COMMISSIONER DIAMOND

I concur with all aspects of the Commission's Final Order except for the conclusion "that CBIDT does not have an undue advantage because of its ability to price its small charters at marginal costs," from which I dissent. As explained below, I would not reach that issue based on the record before the Commission.

For purposes of determining what constitutes an undue advantage under 35-A M.R.S.A. § 713, I am troubled by the conclusion in the Order that a utility may employ excess capacity obtained with the proceeds of monopoly activities to compete in unregulated markets, as long the prices it charges in those markets exceed its marginal costs. Allowing this practice arguably means that the utility gets free use of necessary capital equipment, such as the vessels in the case before us, that its competitor must fund through revenue generated from the very customers for which it and the utility are competing. It is not difficult to understand why the competitor might well believe that having to factor into its prices significant costs from which the regulated monopoly has been freed gives the latter an undue advantage.

I recognize that a similar situation can occur in the absence of a regulated utility. For example, assume that Company A is a large business operating charter boats in numerous markets and that Company B is a small business operating charter boats in a single market, in which Company A is its only significant competitor. It could well be that Company A's success in its other markets enables it to price at below what would be its fully allocated costs (but above its marginal costs) in the market it shares with Company B. Unless Company B can find some violation of the antitrust laws in Company A's conduct, the competitive disadvantage experienced by Company B is the result of legitimate market forces.

In my view, the situation is very different when Company A derives its advantage from its ability to defray all of its fixed costs from revenue obtained in markets in which it has a government granted monopoly. In this case, the advantage may have nothing to do with superior business skills. Indeed, Company A could retain its advantage even if it operated in its monopoly markets in a highly inefficient fashion and Company B functioned as a model of effective business practices.

The instant case cannot, however, be resolved solely on the basis of the analysis set forth above, as it is complicated by the apparent desire of the Legislature to allow CBITD to utilize its excess capacity to serve the tour and charter markets as a means of holding down the price of its ferry service. Even if one believes that the statutory language establishing the District was designed to limit its unregulated activities in comparison to those of its predecessor, there can be no doubt that CBITD is expressly authorized to engage in the tour and charter business. Given the financial turmoil that gave rise to the District, the Legislature may well have intended to permit it to engage in business activities that would be harmful to competitors as long as those activities were incidental to its ferry service (and I agree with the majority's definition of incidental) and beneficial to its ratepayers.

I do not believe we need at this time to choose between what the majority rightly characterizes as potentially conflicting legislative objectives. Evidence in the record suggests that it is likely that the District is currently pricing its small charter services at a level that exceeds its fully allocated costs for providing those services. In addition, there was testimony indicating that the District might be able to easily modify the IREA to determine the fully allocated costs for its small charter services, thereby answering the question of whether they are above or below the District's prices. I would require the District to conduct the analysis necessary to answer this question.

The gist of OPMF's complaint is that CBITD is pricing its competitive services below their fully allocated costs. Thus, if the above analysis showed that not to be the case for the District's small charter services, I would treat as not ripe for resolution the issue of whether such pricing would give the District an undue advantage. Recognizing that costs and prices change, I would further require the District to conduct the necessary cost analysis on a periodic basis, and as long as prices remained at or above fully allocated costs, there would be no need for the Commission to act.

If it did develop that the District was setting, or intended to set, its small charter prices below their fully allocated costs, I would require it to demonstrate that such pricing provides the greatest benefits to ratepayers. Before considering whether to allow the District to engage in a practice in which it might be using its monopoly status in one market to harm competitors in another market, there should be evidence that the practice - in this case, setting prices below fully allocated costs - is necessary to maximize the profits obtainable from the

small charter service. It is only when we have such a record before us that this theoretical dispute ripens into an actual conflict between the interests of the District's ratepayers and those of its competitors, forcing us to make a difficult choice between two reasonable legislative objectives.[1]

In short, I would not now decide the question of whether it constitutes an undue advantage for the District to price its small charter services below their fully allocated costs. Rather, I would order the District to conduct a study to determine whether it is actually engaged in such pricing. The results of that study would dictate the course to be pursued by the Commission, as outlined more fully above.[2]

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[1] It might be argued that the more appropriate inquiry in this situation would be whether the District was pricing its regulated services above their fully allocated costs and using the difference to subsidize its competitive activities. If that were not the case, one could conclude that its ability to price below fully allocated, but above marginal, costs in the small charter market resulted from efficiencies it had achieved in the other unregulated markets in which it operates. That would justify the conclusion that it did not have an undue advantage as a result of its monopoly activities.

[2] I have used "fully allocated costs" as the test for determining whether further Commission scrutiny would be necessary because the gravamen of OPMF's complaint is that the District is pricing below that level. Whether, in the final analysis, fully allocated costs or some other pricing standard, such as prices for comparable services in similar markets, should be the test for deciding whether there is an undue advantage under 35-A M.R.S.A. § 713 is a question on which I express no opinion.